IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658

UNITED STATES OF AMERICA, To the Use of NOLAND COMPANY, INCORPORATED, a Corporation, *Petitioner*,

v.

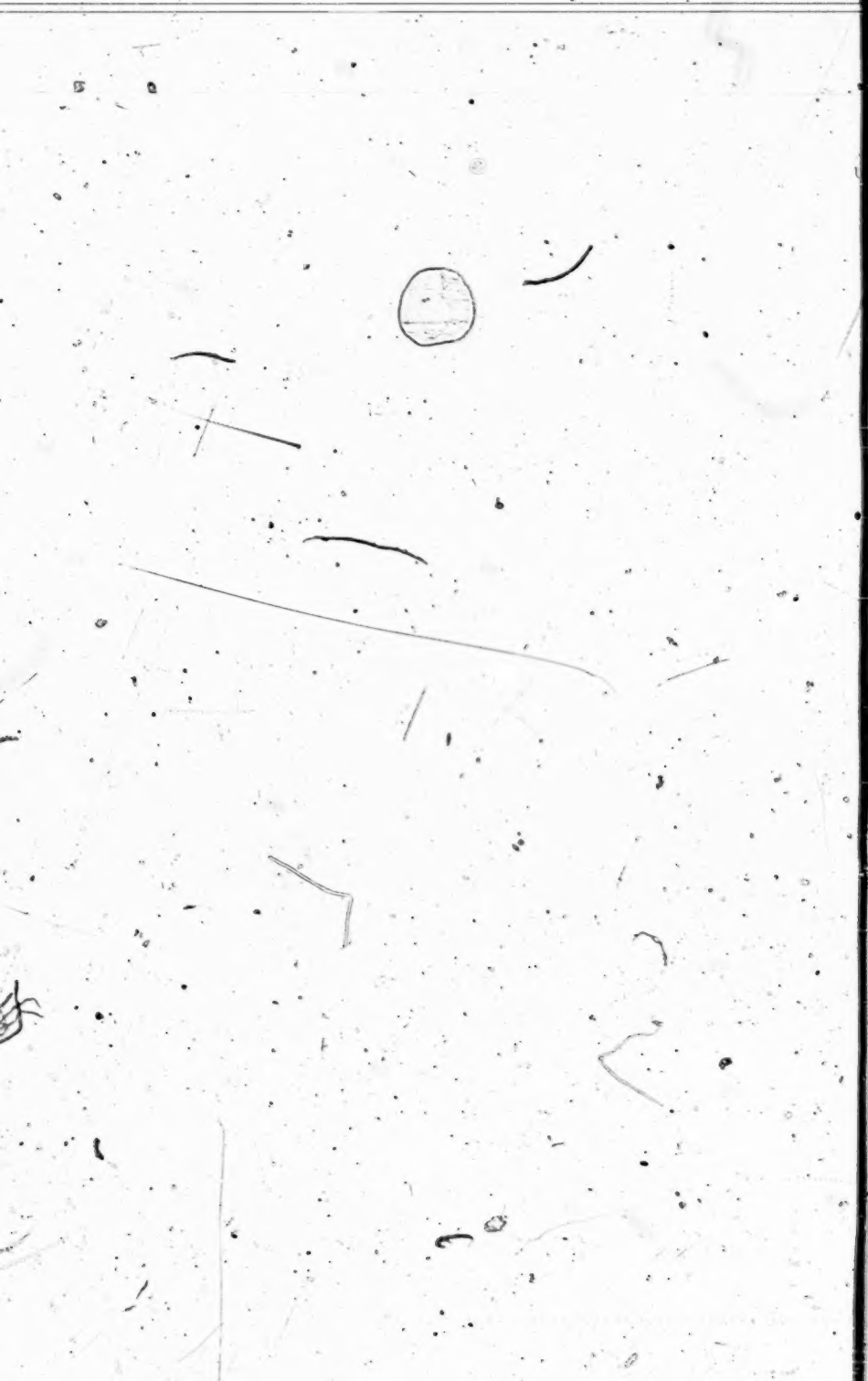
ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, Trading as IRWIN & LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, a Corporation.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF.

BYNUM E. HINTON,
ALEXANDER MacHERON,
Munsey Building,
Washington, D. C.,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

REPLY BRIEF

TABLE OF CASES, STATUTES AND CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 658

UNITED STATES OF AMERICA, To the Use of NOLAND COMPANY, INCORPORATED, a Corporation, *Petitioner*,

v.

ALEXANDER D. IRWIN AND ARCHIBALD O. LEIGHTON, Trading as IRWIN & LEIGHTON, AND UNITED STATES GUARANTEE COMPANY, a Corporation.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

PETITIONER'S REPLY BRIEF.

The Contracting Functions of the Government Are Not Strictly Confined.

The respondents' argument seems to be pitched largely upon the notion that the contracting power of the administrative branch of the Government is restricted to the specific authorization of Congress. This runs counter to the established rule reviewed in *Jessup* v. *U. S.*, 106 U. S. 147.

The report of *U. S.* v. *Maloney*, 4 App. D. C. 505, discloses that the United States had taken a bond to secure the performance of a road construction contract conditioned in part that the contractor "shall be responsible for and pay all liabilities incurred in the work for labor and materials". This was in 1891 and antedated the passage of the Heard Act (1894).

The Miller Act Recognizes the General Powers of Contracting Officers.

The respondents in their discussion of Section 270 a (c) of the Miller Act (Appendix Petitioner's Brief 20, 21), endeavor to read the recognition of a general authority in the contracting officer to require bonds as limited to "a performance bond" (Respondents' Brief pp. 10-11). But that section provides that it shall not be construed as a limitation on "the authority of any contracting officer to require a performance bond or other security *in addition to those*, * * * specified in subsection (a) of this section". *Those* securities which were required in subsection (a) of the same section were " * * * the following bonds * * * (1) a performance bond * * * (2) a payment bond * * * ". Section 270 a (c) also provides that nothing in the section shall be construed to limit the authority of the contracting officer to require such security "in cases other than the cases specified in subsection (a) of this section". The cases specified in subsection (a) are cases of contracts for the construction, alteration or repair of any public building or public work of the United States. Hence it is apparent that Section 270 a (c) is at least a recognition, if not almost a direct authorization to the contracting officer to take bonds of both kinds in cases other than those designated.

The Term "Public Works" Is Not So Limited as the Respondents Contend.

The respondents rely on *United States* v. *Metropolitan Body Co.*, 79 F. (2d) 177, holding that the Miller Act is not applicable to a supply contract for truck bodies. Such contracts are contracts of sale. In such cases the furnishers of material and labor may apparently enforce their liens and claims by ordinary judicial process up to the point where title passes to the United States. Such was the case of *United States* v. *Ansonia Brass & Copper Co.*, 218 U. S. 452. But where the vessel, although a chattel, is constructed by the United States as the owner through a contract for this purpose, furnishers of labor and material may sue upon the bond. *Title Guaranty & Trust Co.* v. *Crane Co.*, 219 U. S. 24. This rule has been applied by the executive branch of the Government to contracts for the remaking of mattresses owned by the United States, 38 Opinions of the Attorney General, 424, 418, and is not limited solely to contracts relating to structures affixed to the land.

The respondents place some reliance on discussion and statements before the Committee of the House of Representatives in its hearing on the Miller Act and eight other bills directed to accomplish the same purpose. The most notable characteristic of the hearing is a tender regard for the interests of persons furnishing labor and material. The discussion in its entirety (R. 34-91) is so general as to be of little help, although it is interesting to note that the bill was reported out on June 19, 1935 (R. 91) which was about a month before the decision in *Maiatico Construction Co.* v. *U. S.*, *supra*, where the Court said:

> "But there is a singular lack of authority defining the phrase 'public works'." 65 App. D. C. 64, 79 F. (2d) 420.

The use of this phrase in the National Industrial Recovery Act, Title 40 U. S. C. A. 402 (Petitioner's Brief Appendix 23), two years before the decision in the *Maiatico* case, is wholly inconsistent with the interpretation given it there.

The Action Is Maintainable by a Third Party Beneficiary.

Respondents' argument that *Bruckner-Mitchell* v. *Sun Indemnity Co.*, 65 App. D. C. 178, 82 F. (2d) 434, would not permit the maintenance of an action on this bond as upon a private obligation is entirely superficial. The argument is based on the earlier procedural distinction between law and equity. Recovery by materialmen was authorized in the *Bruckner-Mitchell* case which was a proceeding in equity, the court pointing out that the common law rule would not permit such a suit on the law side. The adoption of the new Federal Rules after the decision of the *Bruckner-Mitchell* case eliminates the procedural distinction, and the rights of a claimant on such a bond as this may be enforced on equitable principles in a civil action, and the action may be maintained in the claimant's own name. *District of Columbia, etc.* v. *United States Casualty Co.*, 65 App. D. C. 195, 82 F. (2d) 451.

Respectfully submitted,

BYNUM E. HINTON,
ALEXANDER M. HERON,
Attorneys for Petitioner.